

65 - INDEPENDENT AGENCIES - REGULATORY

407 - PUBLIC UTILITIES COMMISSION

CHAPTER 304 - STANDARDS OF CONDUCT FOR TRANSMISSION AND DISTRIBUTION UTILITIES AND AFFILIATED COMPETITIVE ELECTRICITY PROVIDERS

SUMMARY - This Chapter establishes standards of conduct applicable to both large and small investor-owned distribution utilities and affiliated competitive providers, a method of tracking the retail sales made by an affiliated competitive provider within the service territory of its affiliated distribution utility and a requirement that consumer-owned utilities notify the Commission of any wholesale generation sales.

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§ 1 PURPOSE OF RULE; APPLICATION

This Chapter establishes standards of conduct governing the relationship and interactions between a distribution utility and an affiliated competitive provider to promote the development of a fair and efficient competitive retail electricity market.

A distribution utility or an affiliated competitive provider may not use its corporate structure, or any other means, to circumvent the requirements or intent of this Chapter.

§ 2 DEFINITIONS

A. Advertising or Marketing. Advertising or Marketing is:

- 1) Any communication or activity designed or intended to increase the profitability of an entity or to increase the recipient's likelihood of purchasing service from the entity; or
- 2) Any communication or activity that could reasonably be viewed by the recipient of the communication or activity as an attempt to increase the recipient's likelihood of purchasing a service or product.

B. Affiliated Competitive Provider. Affiliated competitive provider means a competitive electricity provider whose relationship with an investor-owned transmission and distribution utility qualifies it as an affiliated interest under 35-A M.R.S.A. § 707.

C. Distribution Utility. Distribution utility means an investor-owned transmission and distribution utility that has an affiliated competitive provider.

D. Joint Advertising or Marketing. Joint advertising or marketing is any advertising or marketing that includes, directly or indirectly, references to both the distribution utility and its affiliated competitive provider. It also includes the use by the affiliated competitive provider of the same or substantially similar name or logo as the distribution utility in a way that would require a payment for good will under Chapter 820.

E. Large Investor-owned Distribution Utility. Large investor-owned distribution utility means an investor-owned transmission and distribution utility serving more than 50,000 retail customers.

F. Regulated Product or Services. A regulated product or service means the transmission or distribution of electricity, services necessary to perform those functions, services for which the utility is the provider of last resort or services the Commission requires the utility to provide, except that any service that a utility provides outside its service territory is not a regulated product or service.

G. Small Investor-owned Distribution Utility. Small investor-owned distribution utility means an investor-owned transmission and distribution utility serving 50,000 or fewer retail customers.

§ 3 STANDARDS OF CONDUCT

A. No Preference. A distribution utility may not, through a tariff provision or otherwise, give its affiliated competitive provider or customers of its affiliated competitive provider preference over nonaffiliated competitive electricity providers or customers of nonaffiliated competitive electricity providers in matters relating to any regulated product or service.

B. Service Provided Without Discrimination. All regulated products and services offered by a distribution utility, including any discount, rebate or fee waiver, must be available to all customers and competitive electricity providers simultaneously to the extent technically possible and without undue or unreasonable discrimination. Nothing in this Chapter prevents a distribution utility from entering into a special contract offering a special rate to a customer or group of customers pursuant to a rate flexibility program approved by the Public Utilities Commission under the Maine 35-A M.R.S.A. § 3195(6).

C. Posting. A distribution utility may not sell or otherwise provide regulated products or services to its affiliated competitive provider without either simultaneously posting the offering electronically on the distribution utility's Internet web site or otherwise making a sufficient offering to the market for that product or service. Provision of the product or service under the terms of a filed tariff constitutes a sufficient offering. Otherwise, a sufficient offering to the market must be approved by the Commission before the distribution utility sells or provides the product or service to its affiliated competitive provider.

D. Requests for Regulated Products. A distribution utility shall process all similar requests for a regulated product or service in the same manner and within the same period of time.

E. No Tying. A distribution utility may not condition or tie the provision of any regulated product, service or rate agreement by the distribution utility to the provision of any product or service in which an affiliated competitive provider is involved.

F. Requests for Information. A distribution utility shall process all similar requests for information in the same manner and within the same period of time. A distribution utility may not provide information to an affiliated competitive provider without a request when information is made available to nonaffiliated competitive electricity providers only upon request. A distribution utility may not allow an affiliated competitive provider preferential access to any nonpublic information regarding the distribution system, customers taking service from the distribution utility, or any other nonpublic information that the utility has obtained as a result of its status as a provider of core utility services that is

not made available to nonaffiliated competitive electricity providers upon request. A distribution utility shall instruct all of its employees not to provide any competitive electricity provider preferential access to nonpublic information.

G. Employees. Employees of a distribution utility may not share with any competitive electricity provider:

1. Any market information acquired from any other competitive electricity provider, other than information that is generally publicly available, without the permission of the competitive electricity provider from which the information was acquired; or

2. Any market information developed by the distribution utility in the course of responding to requests for distribution service, other than information that is generally publicly available.

H. Log of Information Requests. A distribution utility shall keep a log of all requests made by a competitive electricity provider for commercial information that it has obtained by virtue of providing electricity service.. The log is subject to Commission review. The log must:

1. Contain all requests for commercial information from competitive electricity providers, including the nature and date of the request;

2. Identify, for each request, the name of the entity making the request;
and

3. Describe the date and nature of the distribution utility's response to each request. The distribution utility shall protect the information contained in the log from being disclosed to any entity (except the Commission) unless, or until, the Commission determines such protection is unnecessary. Absent such a finding by the Commission, any entity (other than the distribution utility that maintains the log or the Commission) that seeks access to the information contained in the log, must file a request for such access with the Commission. At that time, the Commission will determine the appropriate level of protection for the information pursuant to its statutory authority to grant protective orders.
35-A M.R.S.A. § 1311-A.

I. Promotion of Affiliate; Joint Marketing.

1. Neither a distribution utility nor its affiliated competitive provider may give any appearance of speaking on behalf of the other.

2. Neither a distribution utility nor an affiliated competitive provider may in any way represent that any advantage accrues to customers or others in the use of the distribution utility's services as a result of that customer's or others' dealing with the affiliated competitive provider.

3. A distribution utility and its affiliated competitive provider may not engage in joint advertising or marketing.

4. The distribution utility may not in any manner promote its affiliated competitive provider or any product or service offered by its affiliated competitive provider nor may the affiliated competitive provider promote any product or service offered by the distribution utility.

5. The Commission shall maintain a current list of all competitive providers available to customers in each distribution utility's service territory. The Commission shall update the list and rearrange the names on the list in a random sequence at least every 60 days. If a customer requests information about competitive electricity providers or where the customer may obtain generation services, the distribution utility shall provide a copy of the most recent list of competitive electricity providers issued by the Commission.

6. Unless the distribution utility or affiliated competitive provider is specifically asked what the relationship is between the two entities or whether the distribution utility or affiliated competitive provider has an affiliation or association with a competitive provider or distribution utility, respectively, employees of those entities may not disclose the affiliation. If they are specifically asked, employees may disclose the affiliation but must inform the questioner that:

- a. The affiliated competitive provider is not regulated by the Public Utilities Commission;
- b. No advantage will accrue to any customer of the affiliated competitive provider due to the affiliate's relationship with the distribution utility; and
- c. Customers may select another competitive electricity provider.

The distribution utility shall submit as part of its implementation plan under Section 5 a script containing the information specified above that distribution utility and affiliated competitive provider employees shall use in responding to inquiries regarding affiliated status.

J. No Recommendation. Employees of a distribution utility may not state or provide to any customer or potential customer any opinion regarding the reliability, experience, qualifications, financial capability, managerial capability, operations capability, customer service record, consumer practices or market share of any affiliated competitive provider or nonaffiliated competitive electricity provider.

K. Sharing of Employee Prohibition. Employees of a distribution utility must be located in a separate building from the employees of the affiliated competitive provider. Employees may not be shared between a distribution utility and its affiliated competitive provider. An employee is considered to be shared if the employee performs work for both entities. The employees of a distribution utility and the employees of an affiliated competitive provider must be served by separate telecommunications and computer systems. An employee who is transferred from an affiliated competitive provider to the distribution utility cannot return to the affiliated competitive provider for at least one year.

1. Exemption.

The Commission may approve an exemption from this subsection upon a finding that:

- a. Sharing employees or facilities would be in the best interest of the public;
- b. Sharing employees or facilities would have no anticompetitive effect; and
- c. The costs of any shared employees or facilities can be fully and accurately allocated between the distribution utility and the affiliated competitive provider.

Any request for an exemption must be accompanied by a full and transparent allocation of costs for any shared facilities or general and administrative support services. The Commission shall allow a reasonable opportunity for parties to submit comments regarding any request for an exemption. An exemption is valid until the Commission determines that modification or removal of the exemption is necessary.

L. Books. A distribution utility and its affiliated competitive provider shall keep separate books of account and records, which are subject to Commission review.

M. Dispute Resolution. A distribution utility shall establish and file with the Commission, as part of its implementation plan under Section 5, a dispute resolution procedure to address complaints alleging violations of 35-A M.R.S.A. §§ 3205 & 3206; applicable Chapter 820 provisions governing the actions of the distribution utility and its affiliated competitive provider; the distribution utility's implementation plan; and this Chapter. A dispute resolution procedure must, at a minimum, designate a person to

conduct an investigation of the complaint and communicate the results of the investigation to the claimant in writing within 30 days after the complaint was received, including a description of any action taken and the complainant's right to file a complaint with the Commission if not satisfied with the results of the investigation.

1. Complaints log. The distribution utility shall maintain a log of all resolved and pending complaints. This log is subject to Commission review. The log must include, at a minimum:

- a. The name of the person or entity that filed the complaint;
- b. The date the complaint was filed;
- c. The written statement of the complaint, if any; and
- d. The date the complaint was resolved and the resolution or the reason why the complaint is still pending.

N. Separate Records. A distribution utility shall maintain its books of account and records of its transmission and distribution operations separately from those of its affiliated competitive provider. These books of account and records are subject to Commission review.

O. Implementation Plan. A distribution utility shall maintain in a public place and file with the Commission current written procedures implementing the standards of conduct established by 35-A M.R.S.A. §§ 3205 & 3206 and this Chapter. A copy of this Chapter must be posted in the distribution utility's offices in the same manner as required for minimum wage information under 26 M.R.S.A. § 668. The distribution utility and its affiliated competitive provider shall provide every employee with a copy of the implementation plan and any amendments to the plan. The implementation plan must include procedures to train employees of the distribution utility and its affiliated competitive provider in procedures necessary to ensure compliance with 35-A M.R.S.A. §§ 3205 & 3206 and this Chapter. The implementation plan must be in detail sufficient to enable customers and the Commission to determine that the company is in compliance with 35-A M.R.S.A. §§ 3205 & 3206 and this Chapter.

P. Notice of Stock Acquisition. A distribution utility must immediately notify the Commission if another entity acquires 10% or more of the distribution utility's stock or achieves 10% ownership of the distribution utility's stock after June 26, 1997.

Q. No Subsidization. A distribution utility may not subsidize the business of its affiliated competitive provider at ratepayer expense in any manner not specifically authorized under this section.

R. Compliance with Chapter 820. A distribution utility and its affiliated competitive provider must comply with all applicable provisions of Chapter 820.

§ 4 MARKET SHARE LIMITATIONS

No competitive electricity provider affiliated with a large investor-owned distribution utility may sell or contract to sell more than 33% of the total kilowatt-hours sold at retail within its affiliated distribution utility's service territory over a calendar year. Any standard offer service provided within the distribution utility's service territory by an affiliated competitive provider under Chapter 302 is included within the 33% limitation. No competitive electricity provider affiliated with a large investor-owned distribution utility may bid to provide more than 20% of the total standard-offer service kilowatt-hours in its affiliated distribution utility's service territory.

If a distribution utility has more than one affiliated competitive provider, all limits and sanctions will be determined based on the total kilowatt-hours sold, contracted for sale or bid for sale, respectively, by all of its affiliated competitive providers in the aggregate.

A. Reports. By May 1st of each year, each affiliated competitive provider shall report to the Commission:

1) The total kilowatt-hours it sold at retail between January 1 and December 31 of the previous year within its affiliated distribution utility's service territory; and,

2) The total kilowatt-hours it contracted to sell at retail between January 1 and December 31 of the previous year within its affiliated distribution utility's service territory.

By May 1st of each year, each distribution utility shall report to the Commission the total kilowatt-hours sold at retail between January 1 and December 31 of the previous year within its service territory.

B. Sanctions. A competitive provider affiliated with a large investor-owned distribution utility that sells or contracts to sell more than 33% of the total kilowatt-hours sold at retail in its affiliated distribution utility's service territory or bids to sell more than 20% of the standard-offer kilowatt-hours in its affiliated distribution utility's service territory is subject to the sanctions provided in Section 7.

§ 5 IMPLEMENTATION PLAN

Before an affiliated competitive provider is authorized, or if an affiliated competitive provider has already been authorized, within 30 days after the effective date of this Chapter, the distribution utility must have filed with the Commission an implementation plan in compliance with Section 3(P).

A. Effective Date. An implementation plan takes effect 30 days after it is filed with the Commission unless the Commission suspends the effectiveness of all or part of the plan, in which case the suspended portion takes effect upon Commission approval.

B. Changes. A distribution utility shall file with the Commission any change to an implementation plan. A change to an implementation plan takes effect 30 days after the change is filed with the Commission unless the Commission suspends the effectiveness of all or part of the change, in which case the suspended portion takes effect upon Commission approval.

C. Commission Investigation. The Commission may open an investigation into a distribution utility's implementation plan or a distribution utility's compliance with its plan at any time and may order changes to be made in an implementation plan as a result of the investigation.

§ 6 AUDITS

The Commission shall audit the records of each distribution utility and affiliated competitive provider subject to this Chapter to ensure compliance with 35-A M.R.S.A. §§ 3205 and 3206, applicable Chapter 820 provisions, the distribution utility's implementation plan, and this Chapter.

A. Audit Schedule. For the first three years following adoption of this Chapter, the Commission shall annually audit each distribution utility and affiliated competitive provider. Thereafter, the Commission shall audit investor-owned distribution utilities and affiliated competitive providers at least once every three years but may audit them more frequently at the Commission's discretion.

§ 7 SANCTIONS

This section governs sanctions applicable to violations of 35-A M.R.S.A. §§ 3205, 3206 and this Chapter. For purposes of imposing a sanction under this Section, the provisions of a distribution utility's implementation plan and Chapter 820 are incorporated into this Chapter. Penalties collected pursuant to this section must be deposited in the Public Utilities Commission Reimbursement Fund.

A. General Administrative Penalties; Disgorgement. The Commission may, in an adjudicatory proceeding, impose an administrative penalty of up to \$100,000 for a violation of 35-A M.R.S.A. §§ 3205, 3206 or this Chapter. Each day a violation continues constitutes a separate offense. In addition, the Commission may, in an adjudicatory proceeding, require disgorgement of profits or revenues realized as a result of a violation of 35-A M.R.S.A., §§ 3205, 3206 or this Chapter.

B. Violations of the 33% Market Share Limitation. If an affiliated competitive provider exceeds the 33% market share limitation imposed by Section 4, the penalty is determined according to the following:

1. If in the calendar year reported pursuant to Section 4(A) (current calendar year), the actual retail sales (measured in kilowatt-hours) of an affiliated competitive provider plus its contracted retail sales (measured in kilowatt-hours) exceed 33% but not 35% of the total retail sales in its affiliated distribution utility's service territory in the year previous to the year reported pursuant to Section 4(A) (prior calendar year), the penalty equals the difference between the average revenue per kilowatt-hour the affiliated competitive provider received for sales in the service territory of its affiliated distribution utility during the current calendar year and the New England independent system operator average market clearing prices for capacity and energy for the current calendar year, multiplied by the kilowatt-hours in excess of 33% of the total retail kilowatt-hours sold within the affiliated distribution utility's service territory in the prior year, up to a maximum penalty of \$100,000 per day.

For example, assuming the total retail sales within a distribution utility's service territory in calendar year 2002 was 9,000,000,000 kWhs, an affiliated competitive provider could not sell more than 2,970,000,000 kWhs ($9,000,000,000 \times 0.33 = 2,970,000,000$) within that distribution utility's service territory in calendar year 2003 without incurring a penalty. If, hypothetically, in 2003 the affiliated competitive provider sold 34% of the 2002 total retail kWh sales within its affiliated distribution utility's territory, received \$91,800,000 in revenues associated with those sales and the average market clearing price for capacity and energy in 2003 was \$0.025 per kWh, a penalty of \$450,000 would be due: $[(0.34 \times 9,000,000,000 \text{ kWhs} = 3,060,000,000 \text{ kWhs}; \text{excess sales} = 3,060,000,000 - 2,970,000,000 = 90,000,000 \text{ kWhs}; \text{average revenue per kWh} = \$91,800,000 / 3,060,000,000 \text{ kWhs} = \$0.030 \text{ per kWh sale price}; \text{therefore the penalty} = 90,000,000 \times (0.030 - 0.025) = \$450,000]$.

2. If the affiliated competitive provider's actual retail sales (measured in kilowatt-hours) plus its contracted retail sales (measured in kilowatt-hours) in the current calendar year exceed 35% of the total retail sales in its affiliated distribution utility's service territory in the prior calendar year, the penalty equals the penalty as determined in subsection 1 plus the average revenue per kilowatt hour the affiliated competitive provider received for sales in the service territory during the current calendar year multiplied by the kilowatt hours in excess of 35% of the total retail kilowatt-hours sold within the affiliated distribution utility's service territory in the prior year, up to a maximum penalty of \$100,000 per day.

For example, using the same assumptions as in subsection 1 except that in 2003 the affiliated competitive provider sold 38% of the 2002 total retail kWh sales within that distribution utility's territory and received \$102,600,000 in revenues associated with those sales, a penalty of \$9,000,000 would be due: $[(0.38 \times 9,000,000,000 \text{ kWhs} = 3,420,000,000 \text{ kWhs}; \text{sales in excess of 33\% but up to 35\%} = (0.35 \times 9,000,000,000) -$

$2,970,000,000 = 180,000,000 \text{ kWh}$; sales in excess of 35% = $3,420,000,000 - (0.35 * 9,000,000,000 \text{ kWhs}) = 270,000,000 \text{ kWhs}$; therefore the penalty = $180,000,000 * (0.030 - 0.025) + (270,000,000 * 0.030) = \$900,000 + \$8,100,000 = \$9,000,000$].

C. Divestiture. The Commission shall require a distribution utility to divest an affiliated competitive provider if the Commission determines in an adjudicatory proceeding that:

1. The distribution utility or its affiliated competitive provider has knowingly violated Title 35-A M.R.S.A. § 3205, or this Chapter and the violation resulted or had the potential to result in substantial injury to retail consumers of electric energy or to the competitive retail market for electric energy; or

2. An affiliated competitive provider obtains an unfair market advantage as a result of an entity's ownership of 10% or more of the stock of the distribution utility.

§ 8 CONSUMER-OWNED UTILITIES

A consumer-owned utility must report to the Commission any wholesale sale or sales of generation service that, over any 12-month period, cumulatively exceed 5% of the total kilowatt hours sold at retail by the utility over the same period. The report must describe the details of the transaction and explain why the sale was incidental and necessary to reduce the cost of providing retail service.

§ 9 WAIVER OR EXEMPTION

Upon the request of any person subject to this Chapter or upon its own motion, the Commission may, for good cause, waive any requirement of this Chapter that is not required by statute. The waiver may not be inconsistent with the purposes of this Chapter or Title 35-A. The Commission, the Director of Technical Analysis, or the Presiding Officer assigned to a proceeding related to this Chapter may grant the waiver.

BASIS STATEMENT: The factual and policy basis for this rule is set forth in the Commission's Statement of Factual and Policy Basis and Order Provisionally Adopting Rule, Commission Docket No. 98-457, issued on December 7, 1998, and in the Commission's Order Finally Adopting Rule and Statement of Policy Basis issued on June 29, 1999, and in the Commission's Supplemental Order Finally Adopting Rule and Statement of Policy Basis, issued on September 29, 1999. Copies of this Statement and Order have been filed with this rule at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018.

AUTHORITY: 35-A M.R.S.A. §§ 104, 111, 3205, 3206, 3207, 3203(9)
Resolves 1999, ch. 36; P.L. 1999, ch. 398, Sec. G-5.

EFFECTIVE DATE: This rule was approved as to form and legality by the Attorney General on 10/1/99. It was filed with the Secretary of State on 10/5/99 and will be effective on 11/4/99.